United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

2-21-75

75-7062

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FOR THE SECOND CIRCUIT

SIDNEY DANIELSON, Regional Director, Region 2 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondent-Appellant.

RESPONDENT-APPELLANT'S BRIEF

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Docket No. 75-7062

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RESPONDENT-APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a temporary injunction issued by Judge Constance Baker Motley of the United States District Court for the Southern District of New York on December 19, 1974 (JA 30a).* Judge Motley's injunction has enjoined appellant International Organization of Masters, Mates and Pilots, AFL-CIO ("MM&P") from arbitrating contract breaches it had alleged against Seatrain Lines, Inc. ("Seatrain"). The injunction was issued at the behest of the Regional Director of the Second Region of the National Labor Relations Board ("Board") under section 10(l) of the National Labor Relations Act, as amended ("Act"), after a short preliminary hearing on two afternoons and without permitting respondent to put in its evidence or to file a brief on

* References to the Joint Appendix are preceded by the letters "JA." References to the pages in the transcript of proceedings in the District Court are to the page numbers thereof, preceded by the letters "Tr." References to the volume of exhibits will be by page number thereof preceded by the letters "ExPg."

the law (Tr. 120).

The sole acts charged against respondent are that it sought to arbitrate contract breaches by Seatrain, it being asserted that the contract provisions on which appellant's claim was grounded constituted a "hot cargo" clause proscribed by section 8(e) of the Act.*

MM&P contends that the decision below is fundamentally and profoundly erroneous, and that the error relates to important issues of law and national labor policy. These issues directly concern the preservation of the arbitral forum as the superior and preferred method for resolving industrial labor relations disputes and the deferral by judicial and administrative tribunals, at least in the first instance, to the arbitral tribunal selected by the parties.

THE ISSUES PRESENTED

MM&P and Seatrain are parties to collective bargaining agreements containing broad arbitration clauses and covering supervisory employees exclusively, all of whom are members of MM&P's Offshore Division. In order to preserve the work assigned under the agreements to MM&P members, the agreements are expressly made binding upon all of Seatrain's affiliated and subsidiary companies and applicable to all vessels owned, operated or bare-boat chartered by these companies. The agreements further provide

* The two relevant arbitration demands (Pet. Ex. 3 and Pet. Ex. 4, ExPg 77-79) were also sub judice before Judge Motley, on Seatrain's motion to stay arbitration and Appellant's cross-motion to compel arbitration (74 Civil 1983). Judge Motley has denied both those motions as moot, and both Seatrain and MM&P have appealed from the denial of their respective motions.

that with regard to any sale of a Seatrain vessel to another domestic company, the purchaser must assume the MM&P agreement or else Seatrain must respond in damages which the Arbitrator is expressly empowered to award.

Seatrain sold one vessel and contracted to sell another. The purchasers in turn chartered the vessels to new shipping concerns which, although not under previous collective bargaining commitments to any other deck officer organization, proceeded to contract with an organization other than MM&P. Without interfering with either the sale or the continued operation of the transferred vessel by the new operators, MM&P thereupon sought to arbitrate (1) whether the purchaser, charterer or operator of the vessel is a Seatrain affiliate within the meaning of the agreement; and, alternatively (2) whether Seatrain must respond in damages for transferring the vessel to a company, unencumbered by conflicting bargaining obligations, without having the transferee assume the obligations to hire MM&P members under the MM&P agreements.

In the circumstances, the issues are:*

1. Does MM&P's attempt to arbitrate whether the present owner, charterer or operator of the vessels is a Seatrain affiliate or subsidiary present any conceivable violation of section 8(e) of the NLRA?

2. Does MM&P's alternative arbitral demand for money damages against Seatrain only -- without interfering with the sale

* Other issues than those hereinbelow enumerated were presented to the Court below and before the Board's Administrative Law Judge. Those other issues are reserved for the full presentation of the case on the merits before the Board, and on review, if that should ever be necessary.

or operation of the vessel -- violate section 8(e) of the NLRA notwithstanding the fact that no arbitral proceedings have been held, the arbitrator has not yet been given an opportunity to hear the arbitral claims, and no award has issued?

3. Should this section 10(l) petition be dismissed on the ground that the Board, in accord with established national labor policy, would reject jurisdiction of this case as involving an industrial relations dispute subject to contractually established grievance and arbitration machinery which has already been invoked and which permits arbitral determination of the claims of illegality urged by the company, even if the conduct may arguably also be an unfair labor practice?

4. Does the isolated transaction of transfer of title to a ship, a capital asset, constitute the doing of business within the meaning of section 8(e) of the Act?

5. Should section 8(e) be construed to prohibit the MM&P and its Offshore Division, in representing supervisors alone and acting solely to protect or promote the interests of their supervisory membership, from entering into and enforcing the work preservation provisions of an agreement which applies exclusively to supervisors; and is Seatrain, in its dealings with MM&P, an "employer" within the contemplation of the Act?

6. Should the instant 10(l) petition be denied on equitable grounds because Petitioner made absolutely no showing, not even by a scintilla of evidence, of irreparable injury and insufficient showing of likelihood of success; and in any event, on balancing the equities, the balance falls in favor of MM&P?

STATEMENT OF THE CASE

The Masters, Mates and Pilots

Appellant is a union of supervisors* composed, as its name implies, of supervisory, licensed ships' personnel: (a) Masters (ships' captains), (b) Mates (deck officers), and (c) Pilots (persons who command ships in harbors, rivers, inland waters, and other confined areas). Structurally, the Organization has five subordinate bodies, called "Divisions," but the only Division here relevant is the Offshore Division.

The Offshore Division has nearly 6,000 members, all of whom work as supervisory licensed deck officers on oceangoing ships. The Offshore Division has its own By-Laws, its own officers, its own dues, property and treasury, and files its own separate reports under the Labor-Management Reporting and Disclosure Act. The Offshore Division has its own negotiating committee, prepares its own contract demands, negotiates its own contracts, and its membership alone ratifies and adopts such contracts. (There is an industry-wide agreement with over 100 shipping companies, covering more than 300 vessels and applicable only to the work of licensed deck officers.) All collective bargaining matters of the Offshore Division are handled solely by that Division.

The Offshore Division does not represent or seek to represent anyone except licensed deck officers on oceangoing

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* The facts here set forth are summarized in appellant's offer of proof (Tr. 109-110, 111-112, 114-115). Many of the facts are based upon documents -- e.g., the Constitution of the MM&P and the By-Laws of the Offshore Division.

vessels. Indeed its By-Laws provide explicitly that only licensed deck officers are eligible for membership in the Offshore Division. Article II, section 1(a) of the By-Laws of the Offshore Division provides:

> "Persons eligible for membership in this Organization shall possess a valid United States Coast Guard Merchant Marine Officers license, certificate, or other evidence of professional capability."

The MM&P does have a relatively few members who are statutory "employees." None of them belongs to the Offshore Division. None is covered by the agreement in issue herein. None participates in the selection of the negotiators of that agreement, its ratification or its administration. None is employed by Seatrain or any of its related or affiliated companies.

Seatrain Lines

Seatrain is a corporation engaged in owning and operating oceangoing vessels. It has numerous subsidiaries and affiliates, many of which are engaged in operating oceangoing vessels. One wholly owned subsidiary is Seatrain Shipbuilding, Inc. ("Seatrain Shipbuilding") which is engaged in the business of building ships. Two other wholly owned subsidiaries of Seatrain here involved are Langfitt Shipping Corporation ("Langfitt") and Tyler Tanker Corporation ("Tyler"). Seatrain and its subsidiaries and affiliates are covered and bound by the Offshore Division's collective bargaining agreement. The current agreement is for the period June 15, 1972 to June 15, 1975 (Tr. 8-12, Pet. Ex. 5 [ExPg 84] and Pet. Ex. 6 [ExPg 102]).

The Collective Agreement

There are two collective agreements with Seatrain, the Dry Cargo Agreement (Pet. Ex. 1) and the Tanker Agreement (Pet.Ex.2 [ExPg 1-76]). (The differences between these agreements are not here relevant, and since the vessels here involved are tankers we shall refer only to the Tanker Agreement (Pet. Ex. 2), although the clauses involved are paralleled in the other agreement.) Both agreements are negotiated by a multi-employer bargaining group and then uniform agreements are individually signed by each employer. Both agreements are negotiated by and for the Offshore Division's membership exclusively; and both are ratified exclusively by the Offshore Division. Indeed Article X, Section 3 of the Offshore Division's By-Laws provide for this exclusive bargaining procedure, as follows:

> "Section 3. Negotiating Committee
> A Negotiating Committee consisting of the International President, International Executive Vice President, International Secretary-Treasurer, the Vice Presidents, twelve members from the Atlantic Coast, eight members from the Gulf Coast and eight members from the Pacific Coast, shall prepare contract demands and approve tentative settlements of any contracts affecting the Offshore Division. The Negotiating Committee by its majority vote shall have the authority to call a strike against an Employer or Employers. A majority vote of this Committee shall be required before a proposed contract is presented to the membership in referendum ballot, for ratification."

The Offshore Division's collective bargaining agreement with Seatrain contains detailed provisions governing the wages, hours, and other working conditions with respect to Licensed Deck Officers. No "employees" within the meaning of the Act are covered or provided for by the agreements.*

* E.g., Section XXI(1)(a), (b), Section XXII(1), (3), (4), (5), Section XXIII of the collective agreement as to sea duties of

The Pertinent Contract Provisions

Section V of the collective agreement spells out the circumstances and conditions under which "Vessels [are] Bound by the Agreement." Subdivision 1 of section V provides for "Coverage" of the collective agreement and subdivision 2 of section V provides for "Sales and Transfers" of vessels. Under subdivision 1 of section V, "Coverage" is defined as follows (ExPg 16):

> "a. Vessel Coverage. This agreement covers the Licensed Deck Officers employed on oceangoing U.S.-flag vessels, owned, operated or bareboat chartered (both at present or at any time during the life of this Agreement) by the Company or any of its subsidiaries or affiliates (whether so at present or at any time during the life of this Agreement) as an owner, agent, operator or bareboat charterer.
>
> b. Subsidiary and Affiliate. The term 'subsidiary' or 'affiliate' shall be deemed to include any business entity whether corporate, partnership, trust, individual or otherwise, which is effectively controlled by or effectively controls the Company either directly or indirectly."

Subdivision 2 of Section V provides for "Sales and Transfers" of vessels, as follows (ExPg 17):

> "a. With regard to any sale, charter (but not including a vessel which the Company may be operating under a bareboat charter and the charter is terminated) or any manner of transfer (except sales to foreign flag) of the Company's vessel:
>
> i. At least seventy-two (72) hours prior to the date of the effective transfer of the vessel, written notice must be given to the Organization by the Company.
>
> ii. The execution by the purchaser, charterer or transferee of the Organization's collective bargaining agreement shall be a condition precedent to any sale, charter or transfer.

Licensed Deck Officers and Sections XII, XIV and XV as to their duties while the ship is in port or being shifted. The Regional Director made no claim before Judge Motley that the collective agreements in issue covered non-supervisory employees.

iii. If the Company violates subsection 2(a)(ii) above, the Arbitrator may include as part of his award, loss of wages and contributions to the various Organization Plans.

iv. A violation of subsection 2(a)(ii) above shall also permit the Organization to cancel the no-strike provisions of this Agreement.

b. Sales to Avoid Payment of Severance Monies. The Company agrees that it will not use the device of a sale to another U.S.-flag Company to circumvent the payment of severance monies due under this Agreement."

It is also relevant to note here that when a vessel is transferred to a company already under contract with the MM&P, then the Second and Third Officers transfer with the vessel and continue to work until their 180-day articled jobs are complete (section II(3) of the collective agreement, Pet. Ex. 2, ExPg 5). A transferee has the right either to replace or retain the Master and First Officer, and, if they are not so replaced, they then remain with the transferred vessel (section II(2) of the agreement).

The Transactions in Issue

In 1969 Seatrain acting through its wholly owned subsidiaries, Seatrain Shipbuilding and Langfitt, began construction of a 225,000-ton tanker at the old Brooklyn Navy Yard. Langfitt made application to the Maritime Administration for a subsidy, that is, for United States Government insurance of a construction mortgage loan (Pet. Ex. 5; Tr. 59-60). Seatrain intended to operate this vessel, once it was built, for its own account, and it so stated to the Maritime Administration (Tr. 64-65, Pet. Ex. 5, ExPg 87). Similarly, in 1972 Seatrain began construction of a second vessel, using its wholly owned subsidiaries, Seatrain Shipbuilding

and Tyler, obtaining government subsidies, and intending to operate the completed vessel for its own account (Tr. 65; Pet.Ex. 6, ExPg 106). Langfitt's vessel became the T/T Brooklyn and Tyler's vessel became the T/T Williamsburg (Tr. 65).

Notwithstanding Seatrain's representations and presumably because of changed economic circumstances (Tr. 66; Pet. Ex.8,ExPg 117),the T/T Brooklyn was sold to Wilmington Trust Company ("Wilmington"), as trustee for General Electric Credit Corporation ("GECC"); the buyer bareboat chartered the vessel to East River Steamship Corporation ("East River"); the charterer entered into a management agreement with Anndep Shipping Corporation ("Anndep") for the operation of the vessel; and Anndep made a contract with Westchester Marine Shipping Company ("Westchester") for the latter to furnish officers and crew to the vessel (Tr. 15, 17-19, 42).

As for the T/T Williamsburg, Seatrain had a letter of commitment for its sale to Wilmington as trustee for GECC, to be completed towards the end of December, 1974, as was the case. The vessel was to be bareboat chartered to Kingsway Tankers, Inc. (Tr. 13, 20). Westchester's agreement with Anndep also covers the furnishing of officers and crew for the T/T Williamsburg (Tr. 53).

There was no evidence as to who the bareboat charterers, East River and Kingsway, were, except that Mr. Overman, president of Westchester knew absolutely nothing about East River, did not know what it does, and had no contractual relationship with it (Tr. 50). In this connection, it should be noted that the transferees of these vessels, the bareboat charterers, the operators

or agents are not established shipping companies. They did not have pre-existing agreements with other organizations covering licensed ships' officers; and there would have been no impediments by way of other contractual relationships to compliance with the requirements of Section V, subsection 2(a).

The Demands for Arbitration

The Offshore Division has claimed that Seatrain breached and violated the collective agreements, particularly the above-quoted portions of Section V and has sought to arbitrate these claims (Pet. Ex. 3 and Pet. Ex. 4, ExPg 77, 78-79, 70-72).

The breaches rest on two basic claims: First, Seatrain and its wholly owned subsidiaries purportedly transferred title to the T/T Brooklyn and have made a commitment to transfer title to the T/T Williamsburg. In each instance there is apparently a separate title transferee, bareboat charterer and operating agent. MM&P has been told the corporate names of the companies occupying those roles; but in the maritime industry, particularly, corporate names and identities are frequently born, transmuted and abandoned to mask the true principals. For example, Seatrain itself admits to 25 or 30 subsidiaries (Tr. 10). Thus the first matter sought to be arbitrated is whether the "new" owner, charterer or operator of each vessel is in reality an "affiliate" or "subsidiary" company of Seatrain; for if it is, then Section V, subsections 1(a) and (b) clearly apply and the MM&P-Seatrain agreement continues to govern these vessels.

The second basic issue to be arbitrated assumes,

arguendo, that the first issue is decided against the MM&P. For even if the vessel transfer was to an unaffiliated company, Seatrain wholly failed to comply with the duties and obligations of Section V(2)(a). Neither Seatrain nor its subsidiaries gave prior 72 hours written notice of the intended transfers of title and neither sought to have the purchaser, charterer or transferee execute a collective agreement with appellant covering the deck officers.

The demands for arbitration are in litigation on application by Seatrain to stay arbitration and cross-application by appellant to compel arbitration. This litigation is pending before Judge Motley in the United States District Court for the Southern District of New York (74 Civil 1973); and as we have already noted, these motions have been denied as "moot." To date, therefore, Seatrain has thwarted appellant's efforts to arbitrate its claims; and no arbitration of any kind has been held.

The Absence of Any Strike, Picketing or Interference with the Operation of the Vessels

Appellant has not picketed or struck any vessel, either the two in question or any other vessel owned or operated by Seatrain. Seatrain's own operations continue unabated; the Brooklyn continues to sail without hindrance or intereference under her "new" owners; and construction proceeds on the Williamsburg.

The Prior Proceedings

1. The Charge. On October 1, 1974, Seatrain filed a charge with the Board alleging that appellant had violated section 8(e) of the Act by seeking to arbitrate its claims that Seatrain had violated the collective agreement, thereby seeking to implement and to reaffirm the 1972 agreement. The Board and Seatrain in effect concede that no charge would here lie based upon the contract alone because of the six-month statute of limitations of section 10(b) of the Act. It is the arbitration demands, in the facts and circumstances here present, that provide the narrow hinge upon which rests the charge of violation (JA 8a-9a).

2. The Petition and Answer. After more than two months following the filing of Seatrain's charge, the Regional Director of the Board, asserting that he had reasonable cause to believe that the charge made out a prima facie case of violation of section 8(e) and that a complaint should issue, petitioned the District Court for a temporary injunction under section 10(l) of the Act (JA 2a-7a).

The Respondent denied every material allegation of the petition and pleaded affirmative defenses of legal insufficiency, lack of subject matter jurisdiction, justification of the contract and arbitration as work preservation clauses, and others (JA 10a-21a).

3. The Decision Below. Judge Motley's Opinion, dated December 11, 1974, was based only on evidence produced by the Board. Both factually and legally the Court below has erred.

For example, in her very first sentence, Judge Motley holds that appellant's collective agreement with Seatrain (JA 23a)

"... would in effect prevent consummation of or substantially interfere with sales of Seatrain's ships (the T/T Brooklyn and T/T Williamsburg) to purchasers ...."

There is not an iota of evidence, oral or documentary, to sustain that finding.* The T/T Brooklyn was "sold," according to Seatrain's charge, the petition, and the Board's evidence, on December 31, 1973, well over a year ago. The T/T Williamsburg, again according to Seatrain's charge, the petition, and the Board's evidence, has been under contract of sale since September 5, 1974. Obviously, appellant could not "prevent" the completed sale of the T/T Brooklyn and there is neither claim nor evidence that appellant sought to "prevent consummation" of the sale of the T/T Williamsburg. Nor is there any evidence of any interference, substantial or otherwise, with these sales.

The sole evidence is that appellant sought arbitral adjudication of its rights, claims, and causes of action arising out of Seatrain's acts in purportedly parting with title without complying with the collective agreement. Appellant has sought arbitral relief after the fact; it has not sought to prevent or interfere in sales of vessels -- or, indeed, in post-sale operation -- and it has not been so charged.

The other findings and the conclusions of the Court below are of similar character.

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* Indeed, at the hearing Judge Motley erroneously stated that MM&P had sought to enforce its agreement against the purchasers of the Brooklyn and the Williamsburg (Tr. 100, 101). Not even the flat denial by MM&P's counsel (Tr. 102), to which the total absence of any evidence to the contrary must be added, could dissuade her from this view.

ARGUMENT

I

NEITHER THE BOARD NOR A COURT HAS ANY BASIS FOR RULING THAT THE MERE INVOCATION OF ARBITRATION UNDER THE CIRCUMSTANCES HERE PRESENTED -- BEFORE ANY HEARING HAS BEEN HELD OR ANY ARBITRAL DETERMINATION HAS ISSUED -- VIOLATES SECTION 8(e) OF THE ACT.

A. The MM&P Has an Absolute Right to Arbitrate Whether the Purported Sales of the Two Vessels Involve a Subsidiary or Affiliated Company to Seatrain as Either Title Transferee, Charterer or Operating Agent. If Such Is the Case, Then the Collective Agreement Continues to Apply; and No Conceivable Violation of Section 8(e) Exists.

Appellant's arbitral grievances against Seatrain are cast in the first place in terms of the contractual coverage as defined by Section V(1)(a) and (b), that is to say, appellant seeks to arbitrate whether the new "owner," the new "charterer," the new "operator," or the new "agent" are "subsidiaries and affiliates" of Seatrain and thus bound to Seatrain's collective agreement with MM&P. This, in turn, depends, according to the contract, on whether Seatrain "effectively controls" the new owner, charterer, agent, or operator.

At the hearing below, the Regional Director adduced evidence as to the corporate names of the new owner, bareboat charterer, operator, and agent of the T/T Brooklyn and the T/T Williamsburg. These four roles were filled by different corporate entities, and they were not the same for both vessels. The Regional Director also elicited a conclusory assertion that

these various companies are not corporately related to Seatrain. But there was no evidence as to the ownership or control of any of these corporations, and no witness was produced from any of them who might be questioned along these lines. There was evidence, however, that the corporate body which technically employs the ships' crew had no prior collective agreement with District 2, MEBA, the union now representing deck officers aboard the Brooklyn (Tr. 46). There was also evidence that the Seatrain "family" consisted of some 25 to 30 separate companies (Tr. 10). Finally, there was evidence that within the last two years Seatrain had entered into sale-leaseback transactions with respect to several of its vessels (Tr. 70-71).

Neither the Board nor the Court may determine, at least in the first instance, the claims raised by MM&P under Section V, subsection 1. That is within the exclusive province of the arbitrator; and Seatrain, which has agreed to arbitration in its contracts with MM&P (Pet. Ex. 2, section XXXVI), may not now avoid it and have the arbitrable issue in effect transferred to some other forum by the simple expediency of filing a charge with the NLRB. Moreover, in passing upon the legality of the arbitration demand, neither the Board nor the Courts may pass upon whether it has substantive merit; that is for the arbitrator alone. Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Optical Workers v. Sterling Optical Co., Inc., 500 F.2d 220 (2d Cir. 1974).

Plainly, appellant has an absolute right to arbitrate these issues, and section 8(e) of the Act is totally inapplicable to such demands for arbitration. If there is a successorship

within the contract's frame of reference, then section 8(e) simply has no application and the purported third parties do not truly have such status but are bound to, and part and parcel of, the contract. Familiar principles mandate finding a unity of interest and resolution of the claims in arbitration. Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942); Regal Knitwear Co. v. NLRB. 324 U.S. 9 (1945); John Wiley & Sons Inc. v. Livingston, 376 U.S. 543 (1964). No possible section 8(e) violation is involved.*

B. MM&P's Invocation of Arbitration Against Seatrain under Section V(2)(a) of the Offshore Division Agreement Is Primary in Thrust, Not Secondary, and Does Not Violate Section 8(e) of the NLRA.

MM&P's alternative basis for arbitration rests on Seatrain's failure to have the purchasers of the T/T Brooklyn and T/T Williamsburg agree to the standard MM&P contract which Seatrain itself has signed, as required by Section V(2)(a) of that contract. Inasmuch as this issue will not be reached unless the arbitrator has first determined that none of the purchaser, charterer, agent or operating companies is a subsidiary or affiliate of Seatrain, the relief obtainable by MM&P under this portion of the contract is damages against Seatrain for breach of its undertaking. The sale of the T/T Brooklyn was consummated more than a year ago; the agreement to sell the Williamsburg has

* The Petition pleads the contractual definition of "subsidiary and affiliate" (paragraph 5(h), JA 4a); but the petition utterly fails to allege that the "new" owners, charterers, operators or agents are neither subsidiaries nor affiliates of Seatrain. Thus, as a matter of pleading, the petition is probably legally insufficient and respondent's defense on that score should prevail (Answer, paragraph 19, JA 14a).

been completed. MM&P has not interfered with nor is it seeking to interfere with, or set aside either sale, and has not interfered with the operation or construction of either vessel. Nor is it seeking relief in arbitration against the purchasers, who would not be parties bound in any event. Under this branch of its arbitral demand, it seeks monetary damages against the party with which it has contracted.

Section V(2)(a) of the Offshore Division agreement is designed to preserve the work of the licensed deck officers covered by the Division's multi-employer agreement. With regard to Seatrain, it is designed to protect the MM&P's deck officer work aboard any vessel of Seatrain or its affiliates (this being essentially the scope of covered work under the agreement). It is designed to assure that the deck officer work for Seatrain (and the other employers under similar agreement with MM&P's Offshore Division) is not eroded through sale or transfer of vessels to companies which then seek out some other union and make a cheaper contract with it. It is designed to preserve the jobs and job opportunities of Seatrain deck officers.* A contract company, like Seatrain, which chooses to make such a sale must respond in damages for loss of the MM&P work. Or at least an arbitrator is permitted to so find.

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* The importance of this type of work preservation clause to Seatrain's MM&P deck officers is emphasized by Seatrain's admitted policy of retiring or selling older vessels to permit construction or acquisition of new ones, on at least a two-for-one basis. (Pet. Ex. 6, ExPa 106 and 108; Tr. 70-71.) Seatrain, like other shipping companies, is utilizing one larger, faster new ship to replace several older ones. But because the new vessels do not employ more deck officers, this results in substantial shrinkage of jobs. If older vessels are retired, sold for scrap, or sold into foreign registry then the MM&P agreement cannot protect the jobs of its Seatrain members. The work preservation clause in section V(2) is the only limited job protection available to them.

In this section 10(1) proceeding, however, section V(2)(a) of the agreement cannot be considered on its face. Apart from the absence of any arbitral determination that might cast light on its applicability to any particular fact situation, this proceeding was commenced more than two years after the making of the agreement. Under the six-month statute of limitations in section 10(b) of the NLRA and the authorities construing that limitation, the validity of the contract provision on its face is no longer open to challenge. Only the attempted implementation of that provision in the circumstances of this case may now be questioned.

In NLRB v. Sheet Metal Workers Local 28, 380 F.2d 827 (2d Cir. 1967), this Court (Hays, J.) held that where a contract was entered into more than six months before the filing of an unfair labor practice charge, there could be no violation of the Act because of section 10(b)'s six-month statute of limitations. Moreover, this Court continued, even "subsequent application and enforcement of the clause" would not constitute

> "... unlawful 'reaffirmation' unless the situation to which the clause is subsequently applied is itself violative of the Act." (380 F.2d, at 829-30)

Summing up, this Court pointed out in Sheet Metal Workers that "reaffirmation" of a clause, stale for 8(e) purposes by reason of section 10(b), could only be "reaffirmed" when the union's "demand" (there, to stop using certain products upon a strike threat) and "compliance therewith" were in themselves unlawful 8(e) activity. It is both demand and compliance that constitutes the necessary reaffirmation. See, also, Teamsters Local 695 v. NLRB, 361 F.2d 547 (D.C. Cir. 1966); Teamsters Local 537

(Sealtest Foods), 147 NLRB 230 (1964); Dan McKinney Co., 137 NLRB 649 (1962).

In determining whether this attempt to invoke section V(2)(a) of the agreement in the manner and under the circumstances presented herein constitutes a permissible primary work preservation effort or illegal secondary activity, the facts become highly significant.

First, the parties are only at the threshold of arbitration. Assuming the alternative issue of section V(2)(a) is even reached by the arbitrator, there is no way of speculating what he would hold as to violation vel non, or, assuming he found violation, what remedy he would award. Certainly, there is no reason to assume that he would construe the clause in an illegal manner or issue an award that would bring about a violation of law.

Second, there was no contractual impediment to the purchasers of the vessels assuming the MM&P agreement. Neither the purchasers, charterers nor operators had pre-existing deck officer contracts with any other organization. They were entirely free to recognize and contract with MM&P and would have faced no strike or picketing had they done so. Thus there is no issue here of Seatrain being compelled to forego a sale because its contract commitments to MM&P would have conflicted with the prospective purchaser's commitments to some other organization.

Third, the MM&P arbitral demand under this section of the contract operates solely against Seatrain. It has been unaccompanied by picketing, striking or any other interference with the vessels. It acknowledges the sale and seeks no relief

against the purchaser.

With these factual considerations in mind, we turn now to the applicable law and a fuller consideration of the nature and purpose of the MM&P Offshore Division agreement.

Section 8(e) of the Act provides in part as follows:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void...."

It is, of course, fundamental that section 8(e) was designed to prohibit agreements which are secondary in outlook, while permitting primary agreements, that is, agreements which relate to the labor relations of the unit. National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967); Meat & Highway Drivers v. NLRB, 335 F.2d 709 (D.C. Cir. 1964). "Work preservation" clauses are among those contractual provisions held to be primary, not secondary, and hence falling outside section 8(e)'s proscriptions. Held the Court in National Woodwork, in ruling section 8(e) inapplicable to work preservation clauses (386 U.S., at 635):

> "Although the language of §8(e) is sweeping, it closely tracks that of §8(b)(4)(A), and just as the latter and its successor §8(b)(4)(B) did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, §8(e) does not prohibit agreements made and maintained for that purpose."

In National Woodwork, the Court characterized a work preservation clause as follows (386 U.S., at 644):

"The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees."

And in Meat & Highway Drivers, the test was put this way (335 F.2d, at 713):

"Resolution of the difficult issue of primary versus secondary activity, as it relates to this case, involves consideration of two factors: (1) jobs fairly claimable by the bargaining unit, and (2) preservation of those jobs for the bargaining unit. If the jobs are fairly claimable by the unit, they may, without violating either §8(e) or §8(b)(4)(A) or (B), be protected by provision for, and implementation of, non-subcontracting or union standards clauses in the bargaining agreements. Activity and agreement which directly protect fairly claimable jobs are primary under the Act. Incidental secondary effects of such activity and agreement do not render them illegal."

Section V(2) of the collective agreement is plainly inner directed: its thrust is toward the jobs of Seatrain's own licensed deck officers or at least jobs fairly claimable for them. The collective agreement seeks to preserve jobs and job opportunities for MM&P licensed deck officers. Seatrain has thus committed itself to have all its vessels manned by MM&P members.* This, in effect, defines the scope of the Seatrain operati[illegible]onstituting the MM&P "work" which it is entitled to "preserv[illegible]" These are the jobs "fairly claimable by the bargaining unit", which MM&P is entitled to protect. A contract provision which requires Seatrain to assure that a purchaser

* Notwithstanding t[illegible] usual "after acquired vessel" clause in the Seatrain-MM&P agreement, Seatrain is, of course, entitled to contend before the arbitrator, as it sought to do below, that neither the Brooklyn nor the Williamsburg ever became "vessels" because they were sold prior to completion of construction and were never manned by MM&P members. This may or may not be regarded as justification by the arbitrator; it certainly does not bear on the claim of violation of section 8(e) through the invocation of arbitration machinery, the sole issue in this proceeding.

honors this preserved work, or to respond in damages, does not enlarge the scope of the MM&P work; it merely preserves it against shrinkage and diminution. And particularly is this so in the factual circumstances of this case.*

1. This Court's Decision in NLRB v. National Maritime Union is Distinguishable and Inapplicable Here.

The Court below relied extensively on this Court's decision in NLRB v. National Maritime Union, 486 F.2d 907 (2d Cir. 1973), a reliance, we submit, which was entirely misplaced. Basic distinctions exist between that case and this one:

(a) In National Maritime Union, the arbitration proceeding had already been completed, the arbitrator had issued an award enjoining a sale of the vessel, and the union had moved in court to confirm the award and turn it into an injunctive decree. Thus the Board and the Court had before them the precise nature of the arbitral determination and the precise nature of the remedy awarded and could assess its consequences and legality. Whatever gloss the arbitral process might cast upon the meaning and applicability of the contract had already been cast; nothing further remained to be done.

(b) In National Maritime Union, the purport of the award was to enjoin a sale of the ship. The effect was to immobilize the vessel entirely. Thus, there was direct economic impact upon the secondary employer who had contracted to acquire

* MM&P also urges a broader view of unit, the unit defined by the uniform collective agreements, especially section XXXVII (ExPg 72), the Co-Extensive Employment Pool and the industry-wide hiring system under section II of the agreement (ExPg 3-6).

the vessel and who was being deprived of its use. Here, there has been no actual or threatened interference with either sale or operation and no effort to visit consequences upon the purchaser.

(c) In National Maritime Union, the respondent union had not been content to institute arbitral and judicial enforcement proceedings. It had used pressure and threats against the seller of the ship, and these had been factors in immobilizing the ship. The Court emphasized that it was basing its decision on the totality of the union's conduct, of which this was a significant part. Here, there has been no such conduct and no such effect.

(d) In National Maritime Union, the prospective purchaser was an established shipping company which had a pre-existing agreement with another union. That agreement obligated the purchaser to give the work in question to members of its contracting union. Thus the purchaser could not give the work to NMU members without violating its own agreement and embroiling itself in labor problems with its own union. Indeed, in that case the purchaser was faced with a threat of strike and picketing of all its vessels by its own union, the SIU. This Court characterized that threat as having been "incited" by the NMU's conduct and twice emphasized its importance as evidencing the secondary labor effect condemned by the statute. No such impediment exists here; no such threat has been forthcoming from any source; and the nature of MM&P's monetary demands against Seatrain alone makes it impossible for there to be any.

(e) The NMU contract provision differed significantly

from MM&P's Offshore Division agreement. Section V(2)(b)(iii) of the MM&P collective agreement plainly empowers an arbitrator to award damages, a provision not contained in the NMU's contract and damages have indeed been demanded by MM&P. As to whether or not damages will be awarded, we have no way of knowing. But we do know that monetary relief would operate solely against the primary party, Seatrain.

(f) The NMU agreement provided that upon sale of a vessel, all employees aboard it would be replaced by new assignees out of the NMU hiring hall. Thus there was no job protection of the work of the pre-sale group of NMU employees; and the Court emphasized this factor as negating an intent to protect the work of these particular employees. The MM&P Offshore Division agreement with Seatrain contains no such clause and there is no evidence of any such practice. Indeed, under section II of the collective agreement Second and Third Officers have job protection for their full 180-day articled periods of hiring irrespective of ship ownership, and Masters and Chief Officers also have a right to stay on if the new ship owner does not terminate them.

This Court has recently held that challenges to the legality of contract provisions are, in the first instance at least, for the arbitrator to determine. United Optical Workers v. Sterling Optical Co., Inc., 500 F.2d 220 (2d Cir. 1974). Thus arbitration may not be denied because of alleged invalidity in the substantive provisions underlying the arbitration demands. Yet this forbidden result is precisely the effect of the decision below and the professed object of both Seatrain and the Regional Director.

There are a multitude of potential resolutions of the arbitration proceeding which are purely primary so far as section 8(e) is concerned. The arbitrator might, of course, decide in favor of Seatrain on any of the grounds asserted by Seatrain in this proceeding. Or, mindful of this Court's decision in the National Maritime Union case, he might construe the contract provision as applicable only to a sale to a new company without its own maritime labor agreements and not to a purchaser with existing labor commitments. He could well rule that he has no power to interfere with a sale or otherwise affect prospective ship purchasers, but that he can award damages against the MM&P's contracting party, Seatrain. He could find technical violation, but no ascertainable damages to any sufficiently identifiable group of deck officers. Or, finding violation and provable damages, he would have substantial latitude in fixing the measure or quantum of damages.

2. The Board's Own Decisions Confirm the Right to Arbitrate Monetary Damages Under Clauses Claimed to Violate Section 8(e).

The right to litigate breaches of collective agreements has been sustained by the Board, even as to clauses assertedly violative of section 8(e). For example, in Southern California Pipe Trades District Council No. 16 (Associated General Contractors of California, Inc.), 207 NLRB No. 58, 84 LRRM 1513, 1974 CCH NLRB Dec. ¶25,992 (1973), the Board held that a union did not violate section 8(e) by arbitrating a claim of breach of a collective agreement which provided that certain work must be fabricated by employees working under the

union's collective agreement. The Board pointed out (84 LRRM, at 1514) that there was "no evidence whatsoever" that the union

> "... took any 'extra-contractual' action involving, for example, threats to strike or picket against Ohland [the employer] because of his commitment to install and his actual installation of the prepiped scrub sinks. It is also clear that the conclusion Ohland had indeed violated the contract as charged was reached in the manner contemplated by the agreement, i.e., by a decision of Joint Board, and that the assessment leveled against Ohland was that envisioned by paragraph 13 of the agreement.... There is no evidence at all that Respondents either peaceably or otherwise sought to prevent the installation by Ohland of the Market Forge sinks. Consequently, the matter before us is simply one in which the Respondents have sought to enforce certain provisions of their bargaining agreement against a party to that agreement through the peaceful means provided by the agreement and by no other means."

The Board went on to hold that peaceful enforcement of a collective agreement by the contract's own grievance and arbitration machinery was lawful, even when the provision sought to be enforced was, on its surface, a typical "hot cargo" clause. (84 LRRM, at 1514-15).

Similarly, in Southern California Pipe Trades District Council No. 16 (Tridair Industries, Inc.), 207 NLRB No. 59, 84 LRRM 1518, 1974 CCH NLRB Dec. ¶26,034 (1973), the Board held that a union did not violate section 8(e) by arbitrating a claim for damages for breach of a contractual provision that barred certain non-unit employees from installing plumbing fixtures. In reaching its conclusion that the contract, as applied, did not violate section 8(e), the Board held, 84 LRRM, at 1520-1:

> "The conclusion that the plumbing contractors had breached their agreement with Respondent Unions was reached in the manner contemplated by the agreement -- by a decision of the Joint Board. And the Joint Board's assessment against the plumbing contractors -- for wages and benefits lost -- was as set forth in paragraph 13 of

> the agreement. There was no disruption of the contractors' operations. Consequently, in these instances Respondents have merely sought by peaceful means to enforce their bargaining agreement against employers party to that agreement."

Continuing, the Board held, 84 LRRM, at 1521:

> "... Respondent Unions sought to resolve disputes with the plumbing subcontractors only by invoking the peaceful and jointly agreed-upon means established by their collective-bargaining agreement. We reiterate that a contractual agreement such as this for reasonable compensation for a breach of contract determined by contractually fair procedures is a proper and lawful method of resolving a dispute. We therefore conclude that Respondent Unions' application of the contract here did not constitute statutorily proscribed threats, coercion, or restraint."

In like vein, see Joint Council of Teamsters No. 42 (Merle Riphagen), 212 NLRB No. 5, 86 LRRM 1683, 1974 CCH NLRB Dec. ¶26,728 (1974); and International Union of Operating Engineers Local Union No. 12 (Griffith Co.), 212 NLRB No. 4, 86 LRRM 1690, 1974 CCH NLRB Dec. ¶26,682 (1974).

Appellant has done no more than the unions in the several above-cited cases. Appellant has sought only to arbitrate its claims, appealing to a labor arbitrator to fashion an appropriate remedy for the contract breaches it alleges. That remedy, which can be exclusively damages for lost wages and losses in fund contributions as authorized in clause "(iii)" of the contract, is for the informed judgment of the labor arbitrator, the very person the contracting parties chose.

In all the facts and circumstances, the contract, and the demands for arbitration, do not violate section 8(e). The injunctive order appealed from should be reversed, and the petition dismissed.

II

THE BOARD, IN ACCORD WITH NATIONAL LABOR POLICY, REJECTS JURISDICTION OF A CASE IN WHICH AN INDUSTRIAL RELATIONS DISPUTE IS SUBJECT TO CONTRACTUALLY ESTABLISHED GRIEVANCE AND ARBITRATION MACHINERY AND SUCH MACHINERY HAS BEEN INVOKED, EVEN IF THE CONDUCT IS ARGUABLY ALSO AN UNFAIR LABOR PRACTICE. HENCE, THERE IS NO REASONABLE CAUSE TO BELIEVE THAT THE BOARD WOULD ENTER AN ENFORCEABLE ORDER.

In Collyer Insulated Wire, 192 NLRB 837 (1971) the Board adopted a policy of refusing jurisdiction over cases which are subject to binding voluntary arbitration, agreed to by the parties, even if the conduct could arguably also be violative of the Act. That policy has been followed in a host of Board cases. And it has received the unanimous approval by the United States Supreme Court in William E. Arnold Co. v. Carpenters District Council, U.S. , 40 L. Ed. 2d 620 (1974). The Court there held (40 L. Ed. 2d, at 625), quoting from Collyer:

> "Indeed, Board policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure. See, e.g., The Associated Press, 199 NLRB No. 168 (1972); Eastman Broadcasting Co., 199 NLRB No. 58 (1972); Laborers Local 423 and V & C Brickcleaning Co., 199 NLRB No. 48 (1972); Collyer Insulated Wire, 192 NLRB No. 158 (1971). The Board said in Collyer, 'an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to function.... We believe it to be consistent with the fundamental objectives of Federal Law to require the parties ... to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon

procedures.' Id., at 843. The Board's position harmonizes with Congress' articulated concern that, '[f]inal adjustment by a method agreed upon by the parties is ... the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement ....' Section 203(d) of the LMRA, 29 U.S.C. §173(d)."

Continuing the Court held, 40 L. Ed. 2d, at 626:

"The Board's practice and policy of declining to exercise its concurrent jurisdiction over arguably unfair labor practices which also violate provisions of collective-bargaining agreements for voluntary adjustment of disputes, highlights the congressional purpose that §301 suits in state and federal courts should be the primary means for 'promoting collective bargaining that [ends] with agreements not to strike.' Textile Workers v. Lincoln Mills, 353 U.S. 448, 453 (1957). The assurance of swift and effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no-strike clauses."

Here, appellant has invoked the grievance and arbitration machinery with respect to its dispute with Seatrain, claiming a breach by the latter of Section V of the agreement. Seatrain has sought a stay of that arbitration and appellant has sought an order directing arbitration. The clause (section XXXVI of collective agreement, Pet. Ex. 2) is broad, making arbitrable (ExPg 70):

"All disputes relating to the interpretation or performance of this Agreement ...." (Subparagraph "a")

Moreover, Seatrain's contract, which applies to it, its subsidiaries and affiliates, provides in the plainest of terms that the arbitrator shall have the widest possible power and authority, even the power to decide the threshold issue of arbitrability (ExPg 71):

"The parties agree that all questions as to whether a dispute is arbitrable shall be submitted to and decided by the Arbitrator; provided, however, the Arbitrator shall be without authority to amend the terms of the collective bargaining agreement. The parties agree that all questions concerning the interpretation of an award made by the Arbitrator shall be re-submitted to the Arbitrator for a decision." (Subparagraph "b")

In this posture of agreement, arbitration demand, and the law, the arbitral forum is proper and preferred in accordance with section 301 and national labor policy. Even the claim of violation of section 8(e) of the Act is one that lies "in the exclusive province of the arbitrator." United Optical Workers v. Sterling Optical Co. Inc., 500 F.2d 220 (2d Cir. 1974). Held Judge Hays, for a unanimous Court:

> "Were the issue before us we would have no difficulty holding that the district court erred in declaring Article XXVIII void since the validity of Article XXVIII under section 8(e) is an issue lying initially in the exclusive province of the arbitrator." (500 F.2d, at 223-4)

The Court then went on to hold (500 F.2d, at 224):

> "The district court's holding 'that the issue of whether Article XXVIII of the agreement contravenes section 8(e) of the Act is nonarbitrable' is based on an erroneous reading of our decision in Todd Shipyards Corp. v. Marine Workers Local 39, 344 F.2d 107. (2d Cir. 1965) .... Our national labor policy encourages the settlement of labor disputes through arbitration, see §203(d) of the Labor Management Relations Act 29 U.S.C. §173(d) (1970), even to the extent, for example, of enforcing an arbitration clause despite the anti-injunction provisions of the Norris LaGuardia Act. See Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970). That policy limits the district court's role in a section 301 action to compel arbitration to directing arbitration of disputes falling within the agreement. The scope of the court's inquiry is accordingly limited: 'It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.' United Steelworkers v. American Manufacturing Co., 363 U.S. 564, 568 (1960). In the present case it is clear that Local 408's grievance comes within the arbitration clause and that its claim is governed by Article XXVIII. Whether the subcontracting clause violates Section 8(e) is at least initially in the exclusive province of the arbitrator."

The Supreme Court's decision in Arnold has already had an impact upon the Board. In Electronic Reproduction Service Corp., 213 NLRB No. 110, 87 LRRM 1211, 1974-75 CCH NLRB Dec. ¶15,046 (1974), the Board extended its Collyer rule, holding that it will defer to arbitration without regard to whether the alleged NLRA violation was presented or considered in arbitration so long as it could have been so presented. The Board, in recognizing that "dual litigation" and "forum shopping" are to be discouraged and that voluntary grievance and arbitration settlements are to be encouraged, held (87 LRRM, at 1215):

> "If ... we are to continue to encourage, require, and generally honor the use of available grievance and arbitration procedures to achieve dispute settlement, we ought not encourage either party to withhold from those voluntary procedures full information or relevant evidence on issues scheduled for discussion in the grievance procedure or for hearing by the arbitrator."

Reading Collyer, Arnold, Optical Workers, and Electronic Reproduction together leads to the inescapable conclusion that the Board (and the Court on a 10(1) application) is to defer to the arbitrator, the contractually agreed upon labor relations forum, the issues arising out of appellant's claim of Seatrain's breach of the collective agreement. It will be the arbitrator who will give due weight to the MM&P's claims and to Seatrain's claim of section 8(e) illegality, and then fashion a unique remedy, tailored to fit this particular grievance.

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.... [He will] bring to bear considerations which are not expressed in the contract... such factors as the effect upon productivity of a particular result, its consequence to the morale of the

shop, his judgment whether tensions will be heightened or diminished....

"The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." (United Steelworkers v. Warrior & Gulf, 363 U.S. 574, 580, 581 (1960).)

The intercession by the Board stands on the same footing as intercession by the courts, condemned in Warrior & Gulf and in Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960), in solving the unforeseeable in labor relations disputes arising from a collective bargaining relationship.*

Petitioner made four contentions below and we assume they will be repeated here. These assertions, and our responses, are:

1. Petitioner referred to a memorandum of Peter Nash, General Counsel of the Board, as a guideline for applying Collyer. That memorandum is but an internal communique from the chief prosecutor to his staff; it is neither a decision of the Board itself, nor a Board-adopted rule, regulation or statement of policy. Section 3(d) of the Act makes the General Counsel and his staff independent of the Board, the latter being, under sections 3(a) and (b) of the Act, essentially an independent adjudicative body.

2. Petitioner made a straw-man claim that non-parties to the instant collective agreement presumably would be bound by an award in arbitration although they "would not be represented in the arbitration proceeding." Petitioner's claim

* More than any other portion of section 8 of the Act, section 8(e) on its face shows that adjudications in other forums were contemplated. Section 8(e) provides that violating contracts "... shall be to such extent unenforceable and void...." Unenforceability and invalidity plainly can only be tested in arbitral or judicial forums; not before the Board.

is built on a gratuitous quicksand: that appellant has sought to arbitrate a claim against third parties. Appellant has made no such claim.

3. Petitioner cited a concurring opinion in Bigge Drayage, 197 NLRB 286 (1972). That opinion represented the views of one Board member, not that of the five-member Board, and the decision there turned on an entirely different ground.

4. Petitioner sought to distinguish the Arnold case on a wholly specious basis: that in the instant case Seatrain's conduct constituting the breach for which MM&P seeks arbitral relief is not the same as MM&P's conduct forming the basis of the alleged section 8(e) violation, whereas in Arnold the same conduct was both arguably an unfair labor practice and a contract breach. This is a meaningless distinction. The issues of claimed illegality here and in arbitration are precisely the same. The cross-contentions of the MM&P and Seatrain arise out of the construction to be given the collective agreement by reason of Seatrain's ship sales and the impact, if any, of section 8(e) of the Act. The cross-contentions of the MM&P and the Board also arise out of the construction to be given the collective agreement by reason of Seatrain's ship sales and the impact, if any, of section 8(e). If the arbitrator is to be given first opportunity to declare the illegality of conduct at the instance of the party seeking arbitration, the same principle requires that he also have the first opportunity to declare illegality of conduct at the instance of the party defending against the claim. In either case, the reasons for deferring to the industrial tribunal selected by the parties

are the same. In neither case can it be assumed prior to arbitration that the arbitrator will misapply the governing law.

We urge once again that Arnold and Collyer must be read with the gloss of this Court's unanimous decision in United Optical that the issue of whether there is a section 8(e) violation "is at least initially in the exclusive province of the arbitrator." Arnold and Collyer, taken together, teach that the Board is to defer and dismiss a charge when, as here, the arbitral forum can resolve the issues as between the parties to the collective agreement.

But we need not rely on analysis alone, for we already have an authoritative answer to Petitioner's and Seatrain's contention, from the Board itself and in the very National Maritime Union case on which the Court below, the Regional Director and Seatrain so heavily rely. In that case, in which the claim of section 8(e) illegality was also raised by the employer defensively (to resist an arbitral award), the Board disposed of the deferral issue as follows [Commerce Tankers Corp. (National Maritime Union)], 196 NLRB No. 165, 80 LRRM 1198, 1199, ftnte 4 (1972)]:

> "As the arbitrator's award dealt solely with the interpretation of the contract and did not consider the unfair labor practice issue, the Board will not defer to this award. Monsanto Chemical Company, 130 NLRB 1097, 1099."

Plainly had the issue been raised and passed upon by the arbitrator, the Board's response would have been different. Equally plainly, at the very threshold of arbitration, the arbitrator, under the Board's reasoning, should be given a chance to pass upon the question.

Accordingly, there is no reasonable cause to believe that an enforceable order would be entered by the Board and hence the within 10(l) petition should have been denied. The injunction order should be reversed and the petition dismissed.

III

THE ISOLATED TRANSACTION OF TRANSFER OF TITLE TO A SHIP, A CAPITAL ASSET, IS NOT "DOING BUSINESS" WITHIN THE MEANING OF SECTION 8(e) OF THE ACT.

Section 8(e) proscribes contracts by which a contracting employer agrees "... to cease doing business with any other person." Whether a sale of a vessel comes within this language has specifically been reserved as a question of law by this Court in NLRB v. National Maritime Union, supra, 486 F.2d 907. Said the Court (at 911):

> "Before examining the judicial gloss on section 8(e) most pertinent here, we must note a preliminary problem. In finding a violation of the section in this case, the Board relied on the portion that makes it an unfair labor practice for a union (NMU) and an employer (Commerce) to agree to 'cease doing business with any other person' (Vantage). It may at least be doubted whether an isolated sale of a capital item such as a ship comes within this language. It is arguable that such a transaction does not fit either the letter of the statute or the probable congressional purpose. However, although the Board faced the issue squarely and held that sales of ships occurred 'in the normal course of doing business in the maritime industry,' NMU counsel, at oral argument, expressly disclaimed reliance upon this point. Accordingly, we will assume--without deciding for the future--that in the ship-sale transaction, Commerce and Vantage were 'doing business' with each other and that the disruption of the transaction was a cessation of this." (Emphasis added.)

We raise here the question that was there reserved.

The term "to cease doing business" plainly presupposes a continuing business relationship that is being interrupted. Two elements are necessary: (1) an existing relationship; and (2) a cessation of that relationship. Seatrain's transfers of title to the T/T Brooklyn and the T/T Williamsburg do not, we submit, constitute a "doing business" and the enforcement of the Seatrain-MM&P collective agreement by arbitration does not cause a

cessation in doing business.

1. The sales of these two ships are single, isolated and discrete events; once they take place, they are completed transactions with no subsequent, ongoing relations. Cf., Seatrain Lines, Inc. v. Federal Maritime Commission, 411 U.S. 726 (1973). Whatever "business" may have been involved in making the sales was done, and MM&P's arbitration demands and contract could not effect a cessation of what had already occurred.

The unique and isolated nature of the transaction herein is emphasized by the circumstances through which it came about. Seatrain originally constructed these two vessels with the intent of adding them to the Seatrain fleet and operating them through its own subsidiary companies. Only as construction neared completion -- because of a series of adverse economic blows necessitating the raising of substantial additional capital -- did Seatrain change its plans. (Tr. 64-67; see, also, Applications to Maritime Administration, Pet. Ex. 5 and Pet. Ex. 6, and Seatrain 1973 Annual Report, Pet. Ex. 8). Seatrain was never in the business of constructing vessels for sale to outsiders. This, in other words, was a fortuitous, atypical occurrence; it did not and could not give rise to a cessation of doing business within the meaning of the statute.

2. Moreover, the nature of the arbitration demand also precludes any contention of cessation of doing business. As shown in Point I above, the Seatrain-MM&P agreement is no longer challengeable on its face; only the effort to enforce it can be questioned. But inasmuch as the only enforcement sought herein is through an arbitration aimed at money damages, appellant's actions

cannot be directed at causing a cessation of doing business. Under no view of the statutory language can a demand for money damages be deemed an attempt to compel a severance of business relationships.

IV

SECTION 8(e) DOES NOT APPLY TO AN AGREEMENT, LIKE THIS ONE, WHICH COVERS SUPERVISORS EXCLUSIVELY AND NO STATUTORY EMPLOYEES.

Although the MM&P, in divisions other than the Offshore Division, does have a small number of statutory employees, the agreement challenged in this proceeding covers supervisors exclusively, without exception.* The Seatrain-MM&P Offshore Division contract does not cover a single statutory "employee"; nor do the large number of similar agreements entered into by the Offshore Division and other shipping companies comprising the American merchant marine.

Section 8(e) is a part of the National Labor Relations Act which is designed essentially to regulate labor relations of statutory employees, the labor organizations representing them, and the employers who employ them. When dealing with agreements, it applies to the typical collective bargaining agreement between a statutory employer and a statutory labor organization covering statutory employees. See e.g. sections 8(a)(3), 8(b)(3), 8(b)(4)(C), 8(d), 8(f).

The labor relations and collective agreements of supervisors, on the other hand, are not regulated by the Act,

* See, for example, section XXI(1)(a) of collective agreement and other contract sections cited as illustrations in the footnote at pp. 7-8, supra.

even though these relations may be between organizations which, in other areas, do represent some employees and employers who also employ statutory employees. This does not mean that supervisors are barred from collectively bargaining or from concerted activities; it simply means that these activities and agreements are outside the scope of the Act. For although the Act does not affirmatively give supervisors any protected right to organize, bargain collectively, or engage in concerted activities (such as sections 7 and 8 grant to statutory "employees"), it clearly does not prohibit supervisors from engaging in such activities. Section 14(a) of the Act makes this quite clear:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

In other words, the Act takes a "hands off" attitude toward union activity by supervisors, leaving both supervisors and employers to their respective economic weapons. District 2 MEBA v. New York Shipping Assn., 22 N.Y.2d 809 (1968) cert. denied, 393 U.S. 960; Cox, "Some Aspects of the Labor Relations Act, 1947," 61 Harvard Law Review 1, 5 (1947).

Section 8(e) applies only to agreements between an "employer" and a "labor organization." The use of these terms indicates a clear intention to cover the same type of agreement referred to in the other portions of the Act dealing with agreements: a contract or agreement relating to statutory employees.

The significance of the use of the term "employer" in section 8(e) is emphasized by the entire legislative history of

the 1959 amendments of which this section was a part. For at the same time that Congress added section 8(e) to the Act, it amended the provisions of existing section 8(b)(4), by changing the term "employer" to "person."

The reasons for this change in section 8(b)(4) were reviewed by the Supreme Court in NLRB v. Servette, Inc., 377 U.S. 46 (1964). The Court noted that in certain portions of that section, the use of the statutory terms "employer" and "employees" had created loopholes, which Congress wished to close. Among the modifications made to accomplish this purpose was the substitution of the broader term "person" for "employer."

At the same time and in the same statute, however, when Congress wrote section 8(e), also designed to plug up a loophole in old section 8(b)(4)(A), the legislators used the old term "employer" rather than "person." Clearly, Congress meant to apply the older and narrower term "employer" in describing the proscribed conduct of section 8(e).

The legislative history of section 8(e) itself furnishes further confirmation of Congressional intent to cover the typical collective agreement between statutory employer and labor organization dealing with the labor relations of statutory employees. Thus, when Senator McClellan, chairman of the Select Committee whose investigations and report triggered the 1959 amendments, introduced his bill to outlaw "hot cargo" clauses, he described them as follows (Cong. Record, Senate, Mar. 12, 1959, p. 3524, II Leg. History of the Labor-Management Reporting and Disclosure Act, 1959, p. 1007):

"Closely related to the secondary boycott bill is one that would make unlawful a contract whereby an employer agrees in advance that he will not require his employees to handle goods or provide other services for the benefit of an employer who is involved in a labor dispute.

"The Supreme Court held only last year that a union cannot invoke such a clause as a defense to an unfair labor practice complaint against the union under section 8(b)(4)(A) of the Taft-Hartley Act. However, the Court explicitly left open the question of whether such a clause might have other ramifications in labor-management relations.

"Various law-review commentators have since suggested that such a clause might still be effective to permit an action for damages or specific performance against an employer who orders his employees to perform such services, or that it might protect an employee from being discharged for refusal to carry out such orders. Also to be considered is the possible nonlegal effect of such a clause as a gentlemen's agreement providing moral suasion against an employer.

"To remove any such doubts, and to insure that no hot-cargo clause shall be used as justification for, or in aid of, a secondary boycott, this bill outlaws hot-cargo clauses and provides a penalty against entering into them."

Similarly, Senator Curtis characterized the kind of clause aimed at in the measures which became section 8(e), as follows (Cong. Record, Senate, April 24, 1959, p. 5974, II Leg. History of LMRDA, p. 1197):

"Turning now to amendment 4-17-59-D, the amendment which makes it a crime to enter into a hot cargo agreement, I would not think that at this late date, much would have to be said in support of this subject. There is probably no more vicious and harmful provision in collective bargaining agreements than the hot cargo clause. What it does is require an employer to agree that his employees do not have to handle goods which the union labels as 'hot.' And the union will label as hot the goods of any other employer so long as he will not agree to do what the union wants. If the employer, for example, will not force his employees to join the union which his employees do not want, then the union will declare his goods hot and that means that other employers having hot cargo agreements are precluded from handling such goods.

"The Teamsters in particular have hot cargo clauses in their agreements. If they are unable to organize a particular retailer, let us say, they can virtually put him out of business by stopping all deliveries to and from his place of business by invoking the hot cargo clauses they have in their carrier contracts."

Late in the Senate debates, after the language in the bills had substantially crystallized, Senator Goldwater, one of the Senators most active in sponsoring this legislation, presented a glossary of terms which he felt would help in clarifying future discussions. He defined a "hot cargo clause" thusly (Cong. Record, Senate, Sept. 2, 1959, p. 16209, II Leg. History LMRDA, p. 1386):

"(d) Hot cargo clause: This is a provision in a collective bargaining contract which seeks to permit employees to refuse to perform work on materials or equipment received from or being sent to another employer with whom the union has a primary dispute.

"Under early Board and court decisions, hot cargo clauses were accepted as a valid defense to otherwise unlawful conduct. Subsequent decisions have changed the rule. Hot cargo provisions are no longer a valid defense to otherwise unlawful conduct under the secondary boycott provisions of the act."

Although Seatrain is an "employer" with respect to other employees not represented by MM&P and not covered by the agreement challenged herein, that factor is purely coincidental and immaterial. It has no bearing on the relations between the company and the Organization regulated by this agreement. In so far as this agreement is concerned, it does not relate to any of Seatrain's "employees"; and Seatrain, in agreeing to terms and conditions of supervisors only, is not acting in its capacity as statutory "employer." The agreement, therefore, is simply outside the purview of section 8(e).

V

WHETHER OR NOT MM&P IS DEEMED A LABOR ORGANIZATION UNDER CERTAIN PORTIONS OF THE ACT, IT SHOULD NOT BE CONSTRUED AS A "LABOR ORGANIZATION" WITHIN THE MEANING OF SECTION 8(e).

It is, of course, a "familiar rule , that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892). That principle is especially applicable in construing labor legislation such as section 8(e) "... which is to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be strukc between the uncontrolled power of management and labor to further their respective interests." National Woodwork Mfrs. Ass'n v. NLRB, supra, 386 U.S. 612, 619 (1967). These principles, we submit, require that section 8(e) be construed in a manner consistent with its purposes and with the entire scheme of the Act -- not in the mechanistic manner advocated by the Regional Director and adopted by the Court below.

So construing section 8(e) leads irresistibly to the conclusion that it is inapplicable to the MM&P in the circumstances here present.

Plainly, one method of harmonizing the language of section 8(e) with this construction is to hold that a supervisory union which is acting solely on behalf of its supervisory membership

and which makes a collective agreement affecting exclusively such supervisory membership, is not a "labor organization" for purposes of section 8(e) -- even though, because it has about 250 "employee" members, it may be deemed to be a "labor organization" for other purposes. This approach would be consistent with other cases which have, in a variety of contexts, refused to construe the definition of "labor organization" literally when to do so would have produced a result inconsistent with the manifest purposes of the statute.

Thus, for example, in Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), a group of railroad unions challenged an anti-picketing injunction entered against them by a state court on the ground that the unions involved, while composed primarily of railroad employees, also included "a small percentage of employees ... who may be subjected to the National Labor Relations Act." (394 U.S., at 375). This fact, the unions argued, was sufficient to make them "labor organizations" and to bring them within the exclusive jurisdiction of the Board, thus preempting state court jurisdiction. The Supreme Court held, however, that while these unions might be "labor organizations" for some purposes, they could not be deemed "labor organizations" when they were acting on behalf of their railroad employee membership:

> "The NLRA came into being against the background of preexisting comprehensive federal legislation regulating railway labor disputes. Section 2(2) and (3) of the NLRA, 29 U.S.C. §152(2), (3), expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act. And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act, the organizations must be deemed, pro tanto, exempt from the National Labor Relations Act....

"Whatever might be said where railway organizations act as agents for, or as joint venturers with, unions subject to the NLRA...; or where railway unions are engaged in a dispute on behalf of their nonrail employees; or where a rail carrier seeks a remedy against the conduct of non-railway employees..., none of these is this case. This is a railway labor dispute, pure and simple." (394 U.S. at 376-77)

Similarly, this Court has held that even though a literal reading of the "national emergency" provisions of the Taft-Hartley Act might lead one to conclude that they do not apply to strikes by supervisors -- since the term "strike" is defined as a work stoppage by "employees" -- such a literal reading is inappropriate since it is clear that Congress intended these provisions to cover work stoppages by supervisors as well. United States v. National Marine Engineers Beneficial Association, 294 F.2d 385, 390-93 (2d Cir. 1961).

There is, in short, ample precedent for construing the term "labor organization" differently in differing contexts of the Act, to carry out the manifest grand design of the Act.

VI

ON EQUITABLE GROUNDS ALONE THE PETITIONER MADE ABSOLUTELY NO SHOWING, NOT EVEN BY A SCINTILLA OF EVIDENCE, OF IRREPARABLE INJURY OR OF REASONABLE PROBABILITY OF SUCCESS. THESE REASONS CONSTITUTE A FATAL DEFECT IN PETITIONER'S CASE AND THE 10(1) INJUNCTION SOUGHT SHOULD BE DENIED. IN ANY EVENT, ON BALANCING THE EQUITIES, THE APPLICATION FOR A 10(1) INJUNCTION SHOULD BE DENIED.

This Court has determined in Danielson v. Joint Board, 494 F.2d 1230, 1242 (1974), that the full range of equitable principles applies to a 10(1) injunction application. Held the Court (494 F.2d, at 1242):

"This Court has previously held that a district court should apply general equitable criteria when the Board seeks an injunction under §10(j). McLeod v. General Electric Co., 366 F.2d 847 (2 Cir. 1966), vacated as moot, 385 U.S. 533 (1967). Presumably those criteria would include some likelihood of success. Yet the only distinction between §10(j) and §10(l) - apart from the fact that the latter can be invoked before issuance of a complaint - is that under §10(l) the Regional Director must apply once he 'has reasonable cause to believe such charge is true and that a complaint should issue,' whereas the Board's decision to apply under §10(j) is left to its discretion. Nothing in the language of §10(l) suggests any intention to prescribe a lesser role for the court than under §10(j). See Minnesota Mining & Manufacturing Co. v. Meter, 385 F.2d 265 (8 Cir. 1967); Boire v. International Brotherhood of Teamsters, 479 F.2d 778, 787 n. 7 (5 Cir. 1973)."

In Minnesota Mining, which has become a leading case on this subject, the Court of Appeals held:

"In our view, as suggested by the quoted excerpt from the Senate Report, the district judge's discretion in granting temporary relief under Section 10(j) cannot be activated and motivated solely by a finding of 'reasonable cause' to believe that a violation of the Act has occurred. More is required to guide his permissive range of discretion. Section 10(j) is reserved for a more serious and extraordinary set of circumstances where the unfair labor practices, unless contained, would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal Board channels. In determining the propriety of injunctive relief the district court should be able to conclude with reasonable probability from the circumstances of each case that the remedial purpose of the Act would be frustrated unless immediate action is taken. To hold otherwise and condition the granting of temporary relief solely on a determination of 'reasonable cause' would effectively circumvent the normal NLRB processes established by the Act and muddle the proper allocation of administative and judicial functions."

See also, Douds v. Wine, Liquor & Distilling Workers Union, 75 F. Supp. 447 (S.D.N.Y. 1948); Elliott v. Amalgamated Meat Cutters, 91 F. Supp. 690 (W.D. Mo. 1950); Madden v. Local 134, I.B.E.W., 187 F. Supp. 698 (N.D. Ill. 1960).

There was absoltely no showing in the Court below of irreparable harm or injury; there was not even a scintilla of evidence, or any proffer of such evidence by the Regional Director. Indeed, petitioner would have been hard put to find evidence of irreparable harm in the circumstances here present. MM&P has not picketed or struck or threatened to picket or strike. All that has happened is that MM&P has served demands for arbitration, Seatrain has responded by moving to stay the arbitration and MM&P has replied with a motion to compel the arbitrations. At issue under the contract section challenged by the Board was an arbitral demand for money damages. The motion and cross-motion were pending before Judge Motley at the time the Regional Director's application for a 10(1) injunction was heard.* Plainly, there was no irreparable harm or injury here shown and there is none.

Another principle of equity is that he who seeks the injunction should show some likelihood of ultimate success, that is, that the Board will enter an enforceable order (Joint Board, 494 F.2d, at 1244). No such showing was here made, as appears from the preceding five points in this brief. As this Court held in Danielson v. Joint Board, 494 F.2d, at 1245:

> "... when, after full study, the district court is convinced that the General Counsel's legal position is wrong, ... it should not issue an injunction under §10(1)."

The District Court here erred in not following this precept.

On balance, we submit, the equities weigh in appellant's favor and against the Regional Director, and the Court below should

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* We have already noted that Judge Motley has denied both the Seatrain motion and MM&P cross-motion as "moot." Judge Motley's order of December 18, 1974 in that action goes on to provide that the motions are "subject to renewal at the conclusion of matters now pending before the National Labor Relations Board" (Seatrain v. I.O.M.M.&P., 74 Civ. 1973).

have denied an injunction for that reason too. Indeed, appellant's claim for money damages against Seatrain may well be prejudiced if the commencement of arbitration is delayed until after the completion of the Board proceeding. Many months, at the very least, will pass before this proceeding runs its course through the Board and the likely Court review. Many more months, at least, would pass before the proceeding to compel arbitration could be finally determined, the arbitration hearing held, and enforcement of an award obtained. Seatrain's financial statements (Pet.Ex.8,ExPg 116-123)show a seriously deteriorating fiscal condition; and the vindication of appellant's right to arbitrate at some indefinite future time may be an empty victory indeed.

CONCLUSION

For all the foregoing reasons we urge that the injunction order appealed from be reversed and the petition be dismissed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jules Goldner, being duly sworn, deposes and says that he is over the age of 18. That on the 21st day of February, 1975 he served 2 copies of the within Brief and 1 copy each of Appendix and Exhibit upon N.L.R.B. - Peter C. Nash, Giilbaum and Marvin Roth, attorney(s) for the within named appellee, by depositing three copies of the same, securely wrapped in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Corner of Greenwich & Vesey Street N.Y.C. addressed to said attorney(s) for the appellee at No. 1717 Pennsylvania N.W. Washington, D.C. that being the address where they regularly kept an office, and at which place they regularly received mail.

Sworn to before me this 21st day of February, 1975

Sylvia Morris
SYLVIA MORRIS
Notary Public for the State of New York
No. 31-4325601
Qualified in New York County
Commission Expires March 30, 1976

Jules Goldner

Service of 2 copies of within Brief
is hereby admitted this 21st day
of February, 1975

Sonia G. Arteaga 11:05 am
Attorney for Charging Party

and

Michael London on signed by Susanne Se
Michael London, Esq
Attorney for N L R B